Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-934

RICHARD LAWRENCE AND NICHOLAS BARNES,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO AND THE CITY OF CHICAGO,
Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JURISDICTIONAL STATEMENT.

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	5
The Federal Questions Are Substantial	11
Appendix:	
Action of the Board of Education of the City of Chicago on August 26, 1970	A1
Trust and Trustees Act	A3
Opinion of Appellate Court of Illinois	A4
Decree of Circuit Court of Cook County	A15
Notice of Appeal	A16

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FIRST DISTRICT

JURISDICTIONAL STATEMENT.

The appellants, Richard Lawrence and Nicholas Barnes, appeal from the judgment and opinion of the Appellate Court of Illinois, First District, entered in this proceeding on May 5, 1977, affirming the decree of the Circuit Court of Cook County, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that the federal questions presented are substantial.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, reported at 48 Ill. App. 3d 834, 363 N. E. 2d 116, appears in

the Appendix hereto at A4. No opinion was rendered by the Circuit Court of Cook County herein, but the decree of judgment entered is set forth in the Appendix at A15. The denial of leave to appeal by the Supreme Court of Illinois, without opinion, is reported at 67 Ill. 2d ..... (No. 20, p. xxvi, Oct. 19, 1977).

JURISDICTION

This suit was brought in the Circuit Court of Cook County to compel the Board of Education of the City of Chicago [hereinafter "Board"] to enforce its rights under a lease to the City of Chicago [hereinafter "City"] of common school lands, which the Board holds as trustee under a federal land grant. The judgment of the Appellate Court of Illinois, First District, was entered on May 5, 1977, affirming the decree of the trial court in favor of the defendants. A timely petition to the Supreme Court of Illinois for leave to appeal was denied on September 30, 1977. A notice of appeal to this Court was filed in the Appellate Court of Illinois, First District, on December 21, 1977, and appears in the Appendix hereto at A16. The jurisdiction of the Supreme Court of the United States to review this decision is conferred by Title 28, United States Code, Section 1257(2). The following cases sustain the Supreme Court's jurisdiction to review the judgment below, which upholds a state's legislative act asserted by appellants to be repugnant to the laws of the United States: *Hamilton* v. *Regents of Univ. of California,* 293 U. S. 245 (1934); *Lake Erie & Western R.R.* v. *State Public Utilities Comm. of Illinois ex rel. Cameron,* 249 U.S. 422 (1919).

QUESTIONS PRESENTED

I.

Where a State holds lands in trust for the use of common schools pursuant to conditions accepted by it for admission to the Union and those lands are leased to an instrumentality of

the State for the purpose of operating a public airport, is the State required, as a fiduciary, to exercise the same judgment and care as would a prudent man, considering the probable income and probable safety of those trust lands, in their administration.

II.

Where a State holds lands in trust for the use of common schools pursuant to conditions accepted by it for admission to the Union and those lands are leased to an instrumentality of the State for the purpose of operating a public airport, may the State accept less than the full rental to which it is entitled for the purpose of encouraging public aviation.

III.

Where a State holds lands in trust for the use of common schools pursuant to conditions accepted by it for admission to the Union and those lands are leased to an instrumentality of the State for the purpose of operating a public airport, may the State accept less than the fair market rental for those trust lands.

STATUTES INVOLVED

Action of Board of Education of City of Chicago on August 26, 1970, is set forth in the Appendix hereto at A1.

Ordinance of 1787, Act of Congress, July 13, 1787, U. S. Rev. Stats., 2d Ed. 1878, p. 13:

Paragraph 14, Art. III

> Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Enabling Act, Act of Congress, April 18, 1818, 3 U. S. Stat. at Large 428:

Section 6, Paragraph First

> And be it further enacted, That the following propositions be and the same are hereby, offered to the convention of the said territory of Illinois, when formed, for their free acceptance or rejection, which if accepted by the convention, shall be obligatory upon the United States and the said state.
>
> First. That section numbered sixteen, in every township, and, when such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state, for the use of the inhabitants of such township, for the use of schools.

Ordinance of Illinois Accepting Enabling Act. Passed by Constitutional Convention of State of Illinois at Kaskaskia, August 26, 1818, L. 1819, App., p. 21:

> Whereas, the Congress of the United States, in the Act entitled 'An Act to enable the people of the Illinois Territory to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States,' passed the 18th of April, 1818, have offered to this convention for their free acceptance or rejection, the following propositions, which, if accepted by the convention, are to be obligatory upon the United States, viz.:
>
> 1. That section numbered 16 in every township, and which such section has been sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of the inhabitants of such township for the use of schools.

Illinois Constitution of 1870, Art. VIII, § 2:

School property and funds

> All lands, moneys, or other property, donated, granted or received for schools, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made.

Illinois Constitution of 1970, Transition Schedule, § 9:

General Transition

> The rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution.

Illinois School Code, Ill. Rev. Stat., ch. 122, § 15-1:

Lands constituting

> Section 16 in every township, the sections and parts of sections granted in lieu of all or part of such section, shall be held as common school lands.

Illinois School Code, Ill. Rev. Stat., ch. 122, § 34-2:

City to constitute district—Corporate status of board

> Each city having a population exceeding 500,000 shall constitute one school district which shall maintain a system of free schools under the charge of a board of education. The district shall be a body politic and corporate by the name of "Board of Education of the City of . . . . ." and by that name may sue and be sued in all courts and places where judicial proceedings are had.

Trust and Trustees Act, Ill. Rev. Stat., ch. 148, § 105, is set forth in the Appendix hereto at A3.

STATEMENT

The Board is a body politic and corporate established by the State of Illinois to maintain a system of free schools in the City of Chicago. Ill. Rev. Stat., ch. 122, § 34-2. The City is a municipal corporation chartered by the State of Illinois.

There is situated within Chicago a parcel of common school lands, comprising in excess of 600 acres, which was entrusted to the State of Illinois at the time of its admission to the Union by the United States. The Board holds the parcel in trust for the use of schools under the Northwest Ordinance of 1787, the federal Enabling Act establishing conditions of statehood, the acceptance thereof by the Illinois Constitutional Convention of 1818, the Illinois Constitution of 1870, and the present Illinois School Code.

In 1931, the Board entered into a written lease agreement with the City under which the City leased the subject property to build and operate an airport or landing field, now known as Midway Airport. The lease provided as follows:

1) the lease term was 50 years—to end on December 31, 1980;

2) the annual rent due to the Board for the first 20 years (1931 through 1950) was a flat rate per acre plus ten percent of the City's gross annual receipts from operation of the airport; and

3) for the purpose of determining and fixing the amount of rent to be paid after January 1, 1951, the lease required that an appraisal of the property be conducted, according to procedures set forth in the lease, to determine "the true cash value of the said demised land at the time of such appraisement, exclusive of the improvements thereon, and not taking into consideration any encumbrances, liens, clouds or charges of whatsoever kind standing against the premises." Annual rental was then calculated at six percent of the "true cash value".

The appraisal revaluation procedure was to be repeated for each term of ten years thereafter, six percent of the appraised value of the property at the beginning of each ten year period being the annual rental for each of the succeeding ten years. Thus, the Board had the right to cause the revaluation appraisals

to be made and, from 1951 onward, to receive annual rental calculated at six percent of the true cash value of the land.

However, in 1938, 1964, and 1970, the City requested, and the Board agreed, that the appraisal of the property be deferred and that the rental be continued at a flat rate per acre plus ten percent of the City's gross annual receipts from the airport operation. The challenged action of the Board, adopted on August 26, 1970, provided that the required appraisal be deferred for five more years and that the then present rental basis be continued until January 1, 1975; said action is set forth in full in the Appendix hereto at A1. In 1974, when the lease and its various supplements again called for an appraisal and recalculation of rental at six percent of true cash value of the land, the Board undertook no action to require or implement the appraisal and rental adjustment to which it was entitled.

Appellants Lawrence and Barnes are Chicago residents and taxpayers who are the parents of children enrolled in Chicago public schools.* Appellants instituted this action in 1970 to compel the Board to enforce its rights under the Midway lease, for an accounting of rentals, and to compel the City to pay a fair rental for the Midway parcel. In their Complaint for Injunction (¶¶ 4-8), Amended Complaint for Injunction (¶¶ 8-12), and (Second) Amended Complaint for Injunction (¶¶ 8-12), appellants alleged that the Midway parcel was held in a federally created trust for common schools and that that trust was being violated by acts of the Board and City. (The second amended complaint was filed by appellants to complain of the Board's failure, during the pendency of this action, to cause an appraisal to be made prior to January 1, 1975.) Again, in their trial and post-trial briefs, appellants asserted that the subject lands were held in a trust created by federal legislation and implemented by state constitution and statute.

* The complaint of plaintiffs Joseph Hall, Luther Coleman, and Clifton Smith was dismissed, without objection, at the close of the plaintiffs' case. They have not participated in this appeal or in appellate proceedings below.

At trial, appellants introduced evidence that on August 26, 1970, when the Board adopted the act of which appellants complain (waiving the Board's right to appraisal and rent recalculation):

> 1) The Board had not conducted a study or survey of the "true cash value" of the Midway parcel or projected the rentals which would be received under the lease revaluation provisions.
>
> 2) The Board had not conducted a study or survey to project what rentals might be received if the percentage-of-gross rental basis were continued.
>
> 3) The Board's Real Estate Agent previously had written to the Board's President respecting the parcel:
>
> > It is almost certain that with more than 26 million square feet of land involved that an appraisal would send the rental beyond what the City would feel it could pay.
>
> 4) During the Board's session at which the challenged act was adopted, the Board's Real Estate Agent informally estimated that the Midway parcel's value might range between $20 and $40 million. Under the lease, such values would fix annual rentals at between $1.2 and $2.4 million. The highest percentage-of-gross rental ever previously received for the parcel was $233,181.40 in 1958, when Midway Airport was active; rentals for the years 1965-1969 ranged between $53,899.79 and $193,095.88, averaging $105,878.31.
>
> 5) In 1967 the State of Illinois had offered the Board $1.48 per square foot of a right-of-way strip along one boundary of the Midway parcel; that value projected over the entire parcel would have resulted in a total value of $39.1 million and an annual rental in excess of $2.3 million under the lease provisions (six percent of true cash value).

> 6) At the public portion of the Board's consideration of the challenged enactment, one of the Board's members underscored the Board's lack of fidelity to the trust's purposes:
>
> > DR. FRIEDMAN: Here we find that the Board of Education, which is charged by state law with the operation of schools, is now being asked to help the city operate the Midway Airport to the tune of a million dollars to two million dollars in rental. The rental we are getting now is about $200,000. If we were to get the six percent which our lease calls for, six percent of the appraised value, we would be getting a million dollars at least on a $20 million appraisal, or as much as $2 million on a $40 million appraisal. I think our only obligation really is to the students and to the taxpayers to see that the schools are run effectively and economically, and to see that every resource of the Board is devoted to that purpose and that purpose only.
> >
> > . . . .
> >
> > DR. FRIEDMAN: [during the vote] I am surprised at the lack of conversation on an important subject like this. I know I heard plenty of conversation at the committee meeting and executive committee meeting. I think the public is entitled to get the views of the Board members as they vote on a proposition like this to give away a million dollars or two million dollars.

Concerning the interval between adoption of the challenged act, in 1970, and the Board's "non-action" on the lease, in 1975, appellants introduced additional evidence that:

> 7) The Board commissioned a professional study of its real estate holdings by Real Estate Research Corporation and then apparently ignored that organization's conclusion that a resetting of the rental pursuant to the lease's appraisal mechanism would benefit the Board.

8) The Board was publicly criticized by the Chicago School Board Study Committee to the 76th Illinois General Assembly, which reported, respecting the Midway parcel:

> Since the 1930's the School Board has supported an atrocious rental scheme which denies the schools of revenue it should be collecting.

The foregoing evidence was offered by appellants for the limited purpose of showing facts which put the Board on notice that an investigation as to the value of the Midway parcel and its fair rental was required. Although the Board consistently maintained that it had lawfully discharged its duties in its handling of the Midway matter, neither it nor the City offered any evidence to refute the above-enumerated facts.

The appellants also offered expert testimony, not as to the "true cash value" of the parcel (which determination appellants seek to compel through appraisal), but to demonstrate to the chancellor that the loss to the trust was great. Appellants' expert witness testified that the minimum value of the parcel was $15 million, using the lease's "true cash value" methodology; this evidence was controverted by an expert retained during trial by the City, who testified that the "hypothetical value" of the Midway parcel was less than $4 million. The same witness testified that he, like another City expert witness, believed that the "true cash value" of the parcel was impossible to ascertain, because of the parcel's "special use" as an airport. No evidence was introduced concerning the ability of the City to pay rent for the Midway parcel. The trial court entered judgment in favor of the appellees, without opinion or findings of fact.

On appeal to the Appellate Court of Illinois, First District, appellants asserted in their brief (respecting the duty of care in investing trust funds):

> This duty of care arises not only from the general law of trusts, but is rooted in the compact between the federal government and the State, as well. A trustee of school lands must insure that only the beneficiaries profit from the trust,

> as a matter of federal law. *Lassen* v. *Arizona Highway Dept.*, 385 U. S. 458 (1967).

In response thereto, the Appellate Court of Illinois held that appellees had met the following standard:

> The law is well established that a court will not interfere with the exercise of legislative powers or substitute its judgment unless the action of the Board is palpably arbitrary, unreasonable or capricious; or unless fraud, corruption, oppression or gross injustice is shown. (citations omitted). Appendix at A13-14.

Similarly, in their petition for leave to appeal to the Supreme Court of Illinois, appellants argued that the appellees' acts were in derogation of "a federally imposed fiduciary obligation" to maximize the beneficial use of the land for educational purposes. That petition was denied on September 30, 1977, without opinion.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The court below sustained a legislative act of the instrumentality of the State of Illinois designated to administer the State's common school lands within the City of Chicago. It is well settled that Section 1257(2)'s language "statute of any state" means "every act legislative in character to which the State gives sanction". *See e.g. Hamilton* v. *Regents of Univ. of California*, 293 U. S. 245, 258 (1934) (wherein the order of a federal land grant university's regents requiring military instruction was held to be a "statute of a state"). *See also Lake Erie & Western R. R.* v. *State Public Utilities Comm. of Illinois ex rel. Cameron*, 249 U. S. 422 (1919). The Board's action waiving its right to rental recalculation, asserted by appellants to be repugnant to the terms of the federal grant under which the subject lands are held, was undisputedly a legislative act of the State of Illinois and was treated as such by the court below. Appendix at A13-14.

The question of diversion of these revenues by the State from a federal common school grant to a purpose alien to that trust is a substantial one. The Board's subsidy of Midway Airport may cost one of the nation's largest school systems a sum in excess of twenty million dollars over the final ten years of the lease. Whether Midway Airport should be "revitalized" is not drawn into issue by this lawsuit; rather, appellants contend that school trust funds should not underwrite such a project. No evidence was ever offered suggesting that the City is unable to pay a fair rental on the property during the City's attempts to stimulate airport operations. As one district court noted, when confronted with a diversion of school lands to another public purpose:

> "Of course, benefits to the general public are not synonymous with benefits to the common schools. Presumably all acts of the legislature are for the general public benefit. The whole purpose of placing school lands in trust was so that the proceeds from this trust would not be confused with and utilized for projects for the general public benefit." *United States* v. *78.61 Acres of Land,* 265 F. Supp. 564 (D. Neb. 1967).

Review of the decision below is necessary to preserve this multi-million dollar asset granted in trust for the use of Chicago school children and to reserve its income to their exclusive benefit.

However great the direct consequences of the decision below may be to the Chicago public schools and the body of Illinois public trust law, of greater import to the federal system are the questions presented respecting the administration of federal land grant trusts. Twice in ten years, this Court has reviewed cases concerning such grants, in both instances arising under the New Mexico-Arizona Enabling Act, 36 Stat. 557. *Lassen* v. *Arizona,* 385 U. S. 458 (1967); *Alamo Land & Cattle Co.* v. *Arizona,* 424 U. S. 295 (1976). *Lassen* remains the leading case in public lands law and was cited as controlling by appellants to the courts below. Although Illinois' enabling act lies at the other end of the historical spectrum from those of more

recently admitted states, such as New Mexico and Arizona, the vitality of *Lassen* is not impaired in its application. *Lassen's* holding that a common school trust must be reimbursed for the full value of any property taken for another public use is grounded upon the Congressional purpose in conferring the grant; the New Mexico-Arizona Enabling Act itself was silent on the point at issue. 385 U. S. at 468. Appellants vigorously urge that the common law of fiduciary responsibility is contemplated by all common school and other federal land grant trusts and that *Lassen* is declarative of that common law, irrespective of any differences in the enabling statutes concerned. Any other result would create anomalous categories of States, which may or may not have to hold grant lands faithfully for their dedicated purposes and would permit results of the character rendered below.

This Court stated in *Lassen* that it allowed the petition for certiorari "because of the importance of the issues presented both to the United States and to the States which have received such lands". 385 U. S. at 461. Appellants respectfully submit that if the federal policy underlying the *Lassen* holding is to be vigilantly enforced, then plenary consideration is warranted here, where the Court's opinion will more certainly guide States holding federal land grants, which approximate 330,000,000 acres, 78,000,000 of which were given in support of common schools. 385 U. S. at 460, n. 3.

Manifest error of the court below also requires plenary consideration by this Court, since the Appellate Court of Illinois failed to state or resolve the issues actually before it. Appellants urged at trial that the Board had breached three fundamental duties respecting the common school trust: 1) to exercise judgment and care in its administration; 2) to act with undivided loyalty; and 3) to exact a fair rental. Respecting these first two duties, the evidence showed that the Board made no investigation of the rental alternatives presented it and, disregarding numerous warnings as to the loss potential, acquiesced in the

City's request to aid Midway Airport to the school fund's detriment. Under the Illinois trust statutes and the common law, appellants were entitled to judgment. Instead, the Appellate Court, alluding to the Board's "good faith", held that its action was not arbitrary, unreasonable, capricious, or corrupt. Appendix at A14-15. Appellants submit that this is not the standard to which a trustee of federal lands must be held.

The Appellate Court's imperfect grasp of this case is typified by its handling of the third trust duty, that of receiving a fair rental on trust property. It was as to this breach that appellants introduced expert testimony that the trust property was worth a minimum of $15 million. The Appellate Court acknowledged that the Board's action cost it rental income (Appendix at A8-9), but later concluded that the trial court was presented with a "factual dispute" with respect to the "highest and best use" of the trust parcel and the resulting appraisals, which the trial court "apparently" resolved in favor of the defendants. Appendix at A13. In misapprehending the issues before it, the Appellate Court ruled, in effect, that the appellants had the burden of proving the "true cash value" of the trust property. To the contrary, that determination was not appellants' burden, but is part of the relief they seek. Similarly, the Appellate Court erroneously concluded that the Board "weighed" a number of irrelevant "benefits" in taking the challenged action; the record is, in fact, clear that these asserted "benefits" did not furnish consideration for the Board's waiver of rentals. Appendix at A11-12.

Appellants respectfully submit that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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APPENDIX

ACTION OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO ON AUGUST 26, 1970:

August 26, 1970

70-766-2

SUPPLEMENTAL AGREEMENT WITH THE CITY OF CHICAGO RE:—MIDWAY AIRPORT LEASE

RECOMMENDATION:

Enter into a supplemental lease with the City of Chicago to modify the original lease, and supplements thereto, demising land at Midway Airport, so that the present rental of $24,560.67 per year plus 10% of the gross annual receipts would be continued until January 1, 1975.

All other provisions of the original lease, and supplements thereto are to remain in full force and effect.

That the President and Secretary be authorized and directed to execute appropriate supplemental agreement.

DESCRIPTION:

In 1931 the Board of Education entered into a lease with the City of Chicago for the so-called Midway Airport located in the square mile bounded by W. 55th Street, W. 63rd Street, S. Cicero Avenue and S. Central Avenue, containing approximately 607 acres.

Lease currently provides rental in a fixed amount of $24,560.67 plus an amount equal to 10% of the gross annual receipts.

Lease provides for an appraisal of the land, as of January 1, 1970, for the purpose of fixing annual rental at 6% of such appraised value for the remaining eleven years of the lease.

City of Chicago has been negotiating with all of the air lines servicing Chicago in an effort to revitalize Midway Airport.

City of Chicago has requested that the appraisal for the purpose of establishing rental be deferred for a five-year period so that the revitalization and stabilization of Midway Airport may be achieved.

Committee on Real Estate-Finance at its meeting of August 24, 1970 carefully considered the request of the City of Chicago, and approved and recommended such change as being in the best interest of the Board of Education and of the City of Chicago.

Respectfully submitted,

JAMES F. REDMOND
General Superintendent of Schools

Prepared by:

JOSEPH P. McMAHON,
Real Estate Agent

Approved by:

EDWIN A. LEDERER,
Assistant Superintendent—Operation Services

MANFORD BYRD, JR.,
Deputy Superintendent

Noted:

ROBERT STICKLES,
Controller

Approved as to legal form:

JAMES W. COFFEY,
Attorney

[Stamped]:
Adopted
Board of Education
Aug 26 1970
L. A. Waterloo
Secretary

TRUST AND TRUSTEES ACT, ILL. REV. STAT., CH. 148, § 105 [Formerly "An Act concerning powers of trustees", § 1, Ill. Rev. Stat., ch. 148, § 32]:

Investments—Prudent man rule

(1) In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for any trust heretofore or hereafter created, the trustee thereof shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, the trustee is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures and other corporate obligations, stocks, preferred or common, and real estate mortgages, which men of prudence, discretion and intelligence acquire or retain for their own account, and within the limitations of the foregoing standard, the trustee is authorized to retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.

(2) Subsection (1) shall not be construed as authorizing or requiring any departure from, or variation of, the express terms or limitations set forth in any trust instrument or court order creating or defining the trustee's investment powers or duties, but as used in the instrument the terms "legal investment", "authorized investment" or words of similar import shall mean any investment permitted by subsection (1).

(3) Nothing in subsection (2) shall be construed as restricting the power of the court to permit the trustee to deviate from the terms of the trust instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of trust property.

JOSEPH HALL *et al.*,

Plaintiffs-Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHICAGO *et al.*,

Defendants-Appellees.

First District (4th Division) No. 76-58

Judgment affirmed.

Opinion filed May 5, 1977.

Appeal from the Circuit Court of Cook County; the Hon. Daniel A. Covelli, Judge, presiding.

Robert F. Ward and William Van Hagey, both of Chicago, for appellants Richard Lawrence and Nicholas Barnes.

Michael J. Murray, of Chicago, for appellee Board of Education of the City of Chicago.

William R. Quinlan, Corporation Counsel, of Chicago (Robert Retke, Assistant Corporation Counsel, of counsel), for appellee, City of Chicago.

Mr. Presiding Justice Dieringer delivered the opinion of the court:

This action was brought in the circuit court of Cook County by plaintiffs who are Chicago residents, taxpayers and parents of children in the Chicago public schools against the Board of Education of the City of Chicago (Board) and the City of Chicago (City). They sought injunctive and other equitable relief requiring the Board of Education as trustee for the benefit of schools (1) to determine the rental which should have been received by it from the City of Chicago for the Midway Airport land for each of the years 1969 through 1974, under the terms of the lease requiring that such rental be calculated at 6 percent

of the true cash value of the land as determined by appraisal; (2) to account for said rentals; and (3) to require the City to pay rent calculated as set forth under the terms of the lease for the period January 1, 1975, to December 31, 1980. After a bench trial, the court found the plaintiffs had failed to sustain their burden of proof and entered judgment for defendants.

The issues for review are (1) whether the Board of Education failed to discharge its duty as trustee to exercise judgment and care in the administration of the Midway Airport property; (2) whether the Board of Education failed to discharge its duty as trustee to act with undivided loyalty with respect to the Midway Airport property; and (3) whether the trial court erred in admitting certain evidence offered by the defendants respecting the valuation of the Midway property.

The Board is the owner in trust of the parcel of property known as Midway Airport which is bounded by Cicero Avenue, 63rd Street, Central Avenue and 55th Street on the southwest side of the City of Chicago. The property is almost one mile square and consists of approximately 600 acres. It is "section 16" land within the meaning of section 15-1 of the School Code. Ill. Rev. Stat. 1973, ch. 122, par. 15-1.

In 1931, the Board entered into a written lease agreement with the City under which the Board leased the subject property to the City for use as an airport. The lease extends to December 31, 1980, and rent was to be computed as follows: For the first 20 years (1931-1950), the annual rent due was a graduated flat rate per acre plus 10 percent of the City's gross annual receipts from the operation of the airport, and for the remaining period after January 1, 1951, the lease required that an appraisal of the property be conducted every 10 years to determine "the true cash value of the said demised land at the time of such appraisement exclusive of the improvements thereon and not taking into consideration any encumbrances, liens, clouds or charges of whatsoever kind standing against the premises."

The rental for each year was to be computed at 6 percent of the appraised valuation.

The lease was modified through supplemental agreements executed in 1938, 1964 and 1970. Under the 1970 supplemental agreement the appraisement of the property for the purposes of fixing the annual rent was deferred for five years until the three month period preceding January 1, 1975, and the amount of rent to be paid during that period of time was $24,560.67 plus 10 percent of the gross annual receipts derived by the City from the demised premises.

The lease also provided that at the termination date all improvements become the property of the Board. At the time of trial the airport improvements consisted of a main terminal building, 15 hangar-type buildings, and underground fuel tanks with a capacity of 550,000 gallons. The property is covered with eight major runways 175 feet wide, and the 360,000 lineal feet of runways are constructed of concrete and asphalt to a depth of 36 to 40 inches.

The property was originally bisected by a 17-acre railroad right-of-way, but in 1938 the City arranged to have it relocated, and the property was conveyed in trust for the use of the schools without cost to the Board.

Rentals based on a fixed amount plus 10 percent of the gross annual receipts increased from $16,000 in 1931 to $233,000 in 1958. Rentals then decreased to a low of less than $54,000 in 1965. The approximate rentals for the years 1967 to 1973 were as follows:

1967	$ 68,000
1968	$142,500
1969	$193,000
1970	$232,500
1971	$243,000
1972	$245,000
1973	$231,000

The plaintiffs first contend the Board breached its fiduciary obligation as trustee by failing to adequately investigate the value of the Midway land and by failing to act with an undivided loyalty with respect to the trust. In support of their arguments the plaintiffs point out that on January 29, 1969, Joseph McMahon, who was in charge of the division of real estate of the Board, wrote a letter to Frank M. Whiston, then president of the Board, informing him that an appraisal to determine a new rental for the remainder of the lease should be commenced, but he also stated:

> "It is almost certain that with more than 26,000,000 square feet of land involved that an appraisal would send the rental beyond what the City would feel it could pay."

A report of the real estate committee which was adopted by the Board on August 26, 1970, stated the City had requested that the appraisal for the purpose of establishing rental be deferred for a five year period so that the "revitalization and stabilization of Midway could be achieved." The Board voted nine to one to adopt the resolution and in opposing the action Dr. Bernard Friedman stated the full value of the Midway Airport property would be between 20 and 40 million dollars, an informal estimate provided by Mr. McMahon. Friedman argued the Board had the obligation solely to the school system and not to the airport.

The plaintiffs argue that achieving economic stability for Midway Airport was not a goal which the Board could legally pursue given its duty to administer trust property solely for the benefit of the schools. They rely on the cases of *City of Chicago* v. *Tribune Co.* (1910), 248 Ill. 242; *Lassen* v. *Arizona ex rel. Arizona Highway Department* (1967), 385 U. S. 458, 17 L. Ed. 2d 515, 87 S. Ct. 584, and *United States* v. *78.61 Acres of Land* (D. Neb. 1967), 265 F. Supp. 564, in which the courts held that land held in trust for specific charitable purposes must be used exclusively for the trust beneficiaries, and may not be used for the general public good. They cite the lan-

guage of *Prescott Community Hospital Com.* v. *Prescott School District No. 1* (1941), 57 Ariz. 492, 494, 115 P. 2d 60, 161, in which the court stated:

> "School districts are created by the State for the sole purpose of promoting the education of the youth of the State. All their powers are given them in trust for the same purpose, and any contract of any nature which they may enter into, which shows on its face that it is not meant for the educational advancement of the youth of the district but for some other purpose, no matter how worthy in its nature, is *ultra vires* and void."

The plaintiffs contend that the Board has the burden of proving its good faith dealing by clear and convincing evidence, because the lease of the property to the City, another instrumentality of the State, constituted self-dealing. However, the plaintiffs cite no cases for the unique proposition that the City is the Board's alter ego, and we do not deem it to be persuasive. In *City of Chicago* v. *Tribune Co.* (1910), 248 Ill. 242, 250-51, cited by the plaintiffs, the court held that waiver of a revaluation clause and adherence to an alternative rental index did not constitute a wrong *per se* which would cast the burden of affirmatively demonstrating the propriety of the action upon the defendants. Article VII, section 10 of the 1970 Constitution of Illinois is also relevant. It provides in part as follows:

> "(a) Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance.* * *
>
> * * * * *
>
> (c) The State shall encourage intergovernmental cooperation and use its technical and financial resources to assist intergovernmental activities."

Although it is clear that the Board cooperated with the City in its goal to revitalize Midway and postponed immediate profits

by postponing the revaluation appraisal, the record shows it did so in the hope of obtaining greater future benefits. The termination of the Midway lease on December 31, 1980, is not a remote prospect, and the efforts of the City to revitalize the airport and the tripling of the rent which resulted was of direct benefit to the public school system. Putting the property to an alternative use would require the installation of basic services such as water, power, sewers and streets, and there was testimony that it would take at least five years to redevelop the property. It is clear that the Board would be in a better position if Midway were a profitable going concern when it becomes the sole property of the Board in 1980, than if it were allowed to deteriorate and become a totally uneconomic burden for the next several years.

It is clear that cooperating with the City in the revitalization efforts by postponing the revaluation was not in conflict with the best interests of the Board. In the case of *Sebree* v. *Board of Education* (1912), 254 Ill. 438, 460, the court stated:

> "The evidence, we think, shows clearly that a ten-year re-valuation clause in a long-term lease would not be beneficial to the lessee. It seems to be assumed by counsel for both parties that even though not advantageous to the lessee it would be to the owner. Provisions in a lease, especially on property similar to that here involved, that would be ruinous to the lessee, in the long run might not be advantageous to the owner of the land, for if the lessee became bankrupt by the onerous provisions in the lease the lessor would not be able to collect his rents, and would thereby be compelled to make a new lease on terms fair to both parties or put the land to some other use."

In this case, the evidence established that the postponement of the revaluation was a business decision of a discretionary nature, and that the decision was made after careful deliberations taking all available facts into consideration.

In July of 1971, the Real Estate Research Corporation submitted a study of Board property to the Board. The report con-

cluded that the Midway property should be continued as an airport until a third major airport was built. In March of 1972, a subsequent report indicated that the Midway lease was a restriction on the future disposition of the property, and its use and future marketability were effectively constrained; therefore, the existing use, structures and lease probably precluded a different use in the immediate future. There was no disposition recommendation, and no value was indicated for the property. The report concluded that a revaluation would benefit the Board, but it was possible that by reason of the "percentage of gross" provision in the lease the Board would receive more revenue than it had been receiving if revenues increased as expected.

Joseph McMahon testified that in August of 1969, he sent Frank Whiston, who was then president of the Board, information regarding the lease including a historical sketch, an outline of the lease, and rentals paid in the previous several years. He said the members of the real estate committee were given pertinent information with respect to the lease prior to the committee meetings and were presented with information in the years 1967 through 1970 with respect to the rentals that had been received from the City.

He testified that the Midway lease was discussed by the committee at the meeting on August 24, 1970, and at that meeting he explained the three-fold increase in rent between 1967 and 1969 to the committee members. At the same time he pointed out data showing that the percentage rentals had increased simultaneously with the City's attempt to revitalize the airport. The supplementary lease continuing the percentage of gross rental was approved by the committee, and a report to the full Board was prepared for consideration at its next regular meeting on August 26, 1970.

It should be noted the report was approved by the Board even though Dr. Friedman made the same arguments in opposing it as the plaintiffs make now. Among the Board members voting to continue the "percentage of gross" rental was the president

of the Board, Frank Whiston, who was considered to be one of the most knowledgeable people in the Chicago area with respect to all phases of real estate.

Gerald Sbarbaro, chairman of the real estate committee since 1970, testified the members of the Board, with the exception of Frank Whiston, had no expertise to put a value on real estate, and the Board looked to the Real Estate Research Corporation to provide them with guidance with regard to their real estate holdings, and only on the rarest occasion would the Board not follow its recommendations. Neither the Real Estate Research Corporation report nor the other reports he read contained any opinion of the value of Midway Airport.

He further testified the committee on real estate met on November 21, 1974, and discussed the Midway lease. The committee considered that a recent study of the needs of Midway made by the Federal Aviation Administration was important to any determinations made by the Board. As a result the president of the Board was directed to meet with the Chairman of the Public Works and Transportation Committee of the United States House of Representatives, his congressional committee, and appropriate Federal officials to determine what they had in mind for the future of Midway Airport.

The record also shows the City cooperated with the Board on many matters resulting in very substantial financial benefits to the Board. In its answer to the second amended complaint and in answer to plaintiffs' interrogatories, the Board stated that many local benefits are exchanged between the two local governmental bodies which provide for a mutually beneficial and efficiently operating relationship. Among the benefits received and weighed by the Board were the addition of the railroad right-of-way to the parcel; the capital improvements made since 1931, and in particular the more than 15 million dollars of City, State and Federal funds with which the City upgraded the airport between 1968 and 1970; receiving $8,000,000 from the City's receipts from the 1969 income tax fund; receiving

$1,200,000 to carry out necessary school programs; the payment of the Board's share of the pension contributions at an annual cost of about $11,000,000; the vacation and conveyance to the Board of streets and alleys in order to make school lands contiguous; the furnishing of water without charge to all school buildings and other facilities; trash removal, rodent and pest control in school buildings without charge; and the enhancement in valuation of real estate in general, causing increased real estate tax receipts to the Board through the efforts of the City to develop Midway Airport.

The plaintiffs next argue the Board improperly acquiesced in the City's request to defer an appraisal of the land, knowing that the resulting rental would be lower than the rental which could be derived from 6 percent of the appraised value. They contend the Board had notice that the value of the parcel was as much as $40,000,000, which they base on McMahon's informal estimate and other facts and inferences which we deem not to be persuasive.

However, at trial, Wayne L. Mahnke, the plaintiffs' appraisal witness, testified that in his opinion the minimum value of the land was $15,000,000, but in arriving at that figure he did not take into consideration the cost of removing the runways and other airport improvements. He stated the highest and best use was for an industrial complex, although it could be used for anything from a municipal sports complex to a shopping center.

Both of the defendants' valuation experts, John Lydon and John McNamara, testified they could not determine the "true cash value" of the property because of the special use zoning; however, when asked to form an opinion of the value of the airport without regard to the present zoning, McNamara indicated the highest and best use would be for single-family R-2 development, and the value of the property would be almost $4,000,000. In arriving at that figure he did take into consideration the removal of the runways and other facilities which

he said would cost about $5,500,000. He stated that an industrial or commercial use would not produce a higher return on the property because of the numerous industrial tracts in the area.

Thus, the court was presented with a factual dispute with respect to the highest and best use of the property and with respect to the resulting valuation appraisals, and the court apparently resolved the dispute in favor of the defendants.

The plaintiffs finally contend the court erred by allowing evidence of the special use theory of value, because the language of the lease which specified that the property was to be appraised "exclusive of the improvements thereon, and not taking into consideration any encumbrances, liens, clouds or changes of whatever kind" eliminated the need to consider the present airport zoning.

The plaintiffs also contend that the testimony of Howard Diemler, an airport consultant, should have been excluded. He testified that the percentage of value method of determining the rent was "just not a practical solution" and that the method created problems in terms of the "ability of the City to pay the rental." They argue his testimony was irrelevant to the issues of valuation or whether the trustee failed to discharge its fiduciary obligations.

A review of the record fails to indicate that the evidence objected to played a crucial role in the determination of the outcome of the litigation. Both of the defendants' appraisal witnesses first testified they could not determine the "true cash value" of the property because of the special use zoning, but John McNamara did indicate his opinion of the value of the property exclusive of zoning considerations and thus, he presented evidence independent of the special use theory upon which the court could base its decision.

The law is well established that a court will not interfere with the exercise of legislative powers or substitute its judgment unless the action of the Board is palpably arbitrary, unreasonable

or capricious; or unless fraud, corruption, oppression or gross injustice is shown. *Richards* v. *Board of Education* (1960), 21 Ill. 2d 104, 110; *Bongi Cartage, Inc.* v. *City of Chicago* (1961), 33 Ill. App. 2d 433; *Compton* v. *School Directors* (1955), 8 Ill. App. 2d 243, 249-50; *Crofts* v. *Board of Education* (1969), 105 Ill. App. 2d 139, 148-49.

In this case, the Board had legislative authority to enter into the lease (Ill. Rev. Stat. 1969, ch. 122, par. 34-21), and the record shows it acted in good faith after considering the lease with a view toward maximizing long range benefits and with knowledge of the mutually beneficial pattern of cooperation which exists with the City. In *Giddens* v. *Board of Education* (1947), 398 Ill. 157, 169, the court stated:

> "The questions thus raised by plaintiffs are primarily factual in character and, having been decided adversely to them by the chancellor, in the first instance, and by the Appellate Court upon review, the decrees refusing to set aside the appraisement cannot be reversed, unless contrary to the manifest weight of the evidence."

There have been no allegations of fraud or corruption in this case, and after thoroughly reviewing the extensive record, we conclude the judgment was not contrary to the manifest weight of the evidence.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

JOHNSON and JIGANTI, *JJ.*, concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

JOSEPH HALL, LUTHER COLEMAN, RICHARD LAWRENCE, CLIFTON SMITH and NICHOLAS BARNES,
Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, and the CITY OF CHICAGO,
Defendants.

No. 70 CH 4834.

DECREE

This cause coming on for hearing this day for the Court's ruling herein upon the plaintiffs' 2nd Amended Complaint and defendants' Answer thereto, after trial and consideration of all the evidence submitted by plaintiffs and defendants herein, and the Court having heard all the evidence herein and considering all the briefs filed by the parties herein and now being fully advised in the premises and having given careful consideration to all the matters involved herein:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the plaintiffs have failed to sustain the burden of proof herein and the Court hereby enters judgment and decree for the defendants the Board of Education of the City of Chicago, a body politic and corporate, and the City of Chicago, a municipal corporation.

October 24, 1975.

ENTER:

DANIEL A. COVELLI
Judge

No. 76-58

IN THE APPELLATE COURT OF ILLINOIS
First District.

JOSEPH HALL, LUTHER COLEMAN, RICHARD LAWRENCE, CLIFTON SMITH and NICHOLAS BARNES,
Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, and the CITY OF CHICAGO,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County.

Honorable Daniel A. Covelli, Judge Presiding.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that Richard Lawrence and Nicholas Barnes, appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Appellate Court of Illinois, First District, entered in this action on May 5, 1977, affirming the decree entered herein by the Circuit Court of Cook County on October 24, 1975.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

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[Stamped]:
Filed
Appellate Ct. 1st Dist.
1977 Dec 21 PM 357
Gilbert S. Marchman
Clerk of Court

PROOF OF SERVICE

Susan Kreitman, upon oath, states that she served the foregoing notice of appeal upon:

William R.Quinlan, Esq.	Michael J. Murray, Esq.
Corporation Counsel of	Board of Education of the
the City of Chicago	City of Chicago
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Chicago, Illinois 60602	Chicago, Illinois 60601

by depositing copies of same, addressed to the above-mentioned attorneys and with first class postage affixed, in the United States mail at Chicago, Illinois on December 21, 1977.

SUSAN KREITMAN

Subscribed and sworn to before me this 21st day of December, 1977

/s/ BERNICE L. MUELLER,
Notary Public.

Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-934

RICHARD LAWRENCE and NICHOLAS BARNES,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO and THE CITY OF CHICAGO,

Appellees.

On Appeal From The Appellate Court Of Illinois, First Judicial District

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-934

RICHARD LAWRENCE and NICHOLAS BARNES,

Appellants,

VS.

BOARD OF EDUCATION OF THE CITY OF CHICAGO and THE CITY OF CHICAGO,

Appellees.

On Appeal From The Appellate Court Of Illinois, First Judicial District

MOTION TO DISMISS OR AFFIRM

The Appellee, City of Chicago, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Illinois Appellate Court on the grounds that the decision of the Illinois Appellate Court did not "[draw] in question the validity of a statute of any state" and is therefore not reviewable in this Court and on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

Plaintiffs are taxpayers and parents of Chicago public school students. Their action sought equitable relief against the Board of Education of the City of Chicago, trustee and lessor of certain section 16 land, and the City of Chicago, lessee of the land. The Section 16 land involved is approximately 600 acres located on the Southwest Side of Chicago on which Chicago's Midway Airport is constructed.

The substance of plaintiffs' complaint was that the Board of Education had agreed to the application of a rental computation formula which resulted in an inadequate amount of rental income from the Midway Land to the Board. The plaintiffs contended that the allegedly inadequate rental was the consequence of either the Board's inattention to the management and income potential of the land or of a desire to subsidize the City of Chicago's efforts to revitalize Midway Airport. These alleged failings of the Board, plaintiffs complained, were in violation of the Board's duties as trustee of the Section 16 land for the benefit of the public schools.

After a trial, in which extensive evidence of the land's value and the Board's procedures in arriving at a rental formula was presented, the trial court found for the defendants and denied relief to plaintiffs. On appeal the Illinois Appellate Court affirmed the judgment of the trial court.

The Appellate Court found that the issues in the case were factual and that the judgment was supported by the manifest weight of the evidence. (Jurisdictional Statement, A14) The Court found that the Board acted in good faith in discharging its trust responsibilities and

that the business decisions it made with a view toward the long term maximization of profits balanced against short-term income opportunities, were not unsound. (Jurisdictional Statement, A9, A14). The Appellate Court also noted evidence that the value of the land was substantially lower than contended by plaintiffs and that plaintiffs had failed to recognize several items of valuable consideration flowing from the City to the Board in their computation of rental payments. (Jurisdictional Statement, A11-A13). The conclusion was that the total compensation from the City to the Board for the use of the land was fair and reasonable.

The Illinois Supreme Court denied plaintiffs leave to appeal the decision of the Appellate Court.

ARGUMENT

I.

THE ISSUES PRESENTED BY THE CASE ARE FACTUAL. THERE ARE NO SUBSTANTIAL ISSUES WARRANTING REVIEW BY THIS COURT.

Judgment was entered against plaintiffs because they failed to submit persuasive evidence either that the value of the land was so great as to warrant rentals higher than those actually paid or that the Board of Education had departed from its duties in the way that it discharged its trust responsibilities.

Plaintiffs attempted to prove through the testimony of a real estate expert that the land was worth in excess of $15,000,000 (A12) and accordingly should have generated rental income for the Board several times

that actually realized by the Board pursuant to its agreement with the City. That expert's testimony was premised upon the assumption that the land would be used for industrial purposes. The land, however, was not zoned for industrial use, testimony indicated that rezoning of the land for industrial use was, at best, problematic and there appeared to be an abundance of under-utilized industrial-zoned land in the vicinity. Testimony of a defense expert indicated that the highest and best alternative use of the land would be for residential purposes and that premised upon residential use the total value would be approximately $4,000,000. (Jurisdictional Statement, A12). Fair rental computations based upon the valuation indicated by defense evidence fully supported the reasonableness and fairness of the rental agreed upon and received by the Board.

Thus plaintiffs did not furnish credible evidence that the Board had failed to obtain an appropriate income from the land.

Nor did plaintiffs' evidence establish any other shortcomings in the Board's discharge of its trust responsibilities. Not only did the evidence fail to establish any dereliction in administration of the Board's duties but also the Court recognized that even if the Board had taken actions calculated to aid the City's efforts in encouraging an expansion of Midway facilities this was reflective only of a farsighted policy of improving the land's long term capital value. (Jurisdictional Statement, A8-A9).

For all of these reasons it is clear that the decision of the Appellate Court depends entirely upon the failure of plaintiffs' evidence to suggest any departure by the Board of Education from its fiduciary responsibilities. Accordingly, it is submitted that no issue meriting this Court's attention is presented.

II.

NO STATE STATUTE IS DRAWN INTO QUESTION BY THE DECISION OF THE APPELLATE COURT. THE APPELLATE COURT DID NOT CONSIDER THE VALIDITY OF ANY STATE ACTION AS MEASURED BY ANY FEDERAL LAW. JURISDICTION DOES NOT EXIST UNDER THE PROVISIONS OF 28 U.S.C. § 1257(2).

Appellants suggest that 28 U.S.C. § 1257(2) provides the jurisdictional basis for review of this cause. Section 1257(2) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellants contend that the adoption by the Board of the lease agreement with the City is a "statute of any state" as that term is employed by section 1257(2). (Jurisdictional Statement, 2, 11, A1-A2). In support of this contention Appellants cite *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934), and *Lake Erie & Western R.R. v. State Public Utilities Commission of Illinois, ex rel. Cameron*, 249 U.S. 422 (1919). In *Hamilton* this Court held a mandatory military training rule adopted by the Board of Regents to be a "statute of any state" within the terms of the predecessor of section 1257(2). This Court said:

> The assailed order prescribes a rule of conduct and applies to all students belonging to the defined class. And it was because of its violation that the regents by resolution suspended these students. [293 U.S. 258]

Similarly in *Lake Erie & Western R.R.* a regulatory order of the state public utility commission was held a "state law" for the purposes of this Court's jurisdiction. Neither of these cases is supportive of the instant appellants' position. Here involved is a business decision of the Chicago Board of Education arising entirely out of the Board's proprietary functions. Unlike the rules at issue in *Hamilton* and *Lake Erie & Western R.R.*, the Board's business decisions with respect to income properties for which it has custodial responsibility have no regulatory dimension. It is submitted that for this reason the contract between the Board and the City is not a "statute of any state," and that jurisdiction for appeal in this Court is accordingly lacking.

Moreover, it is also clear that the Appellate Court did not have occasion to consider the validity of the Board's contract as measured against any provision of "the Constitution, treaties or laws of the United States." As the discussion in Point I, *supra*, indicates the Appellate Court did not consider any conflict of the contract with federal law for the reason that the Court found the factual determination that the Board received a fair market return on the property to be dispositive of the case. For this additional reason it is also submitted that the jurisdictional requirements of Section 1257(2) are not met.

CONCLUSION

Wherefore, Appellee, City of Chicago, respectfully submits that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument and that the cause does not meet statutory jurisdictional requirements. Appellee accordingly moves the Court to dismiss this appeal, or in the alternative to affirm the judgment entered in the cause by the Illinois Appellate Court.

Respectfully submitted,

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January 27, 1978

Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-934

RICHARD LAWRENCE AND NICHOLAS BARNES,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO AND THE CITY OF CHICAGO,
Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MOTION OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO TO DISMISS OR AFFIRM.

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INDEX.

	PAGE
Motion to Dismiss or Affirm	1
Statement	2
Argument	4
Conclusion	10

CITATIONS.

Cases.

Alabama v. Schmidt, 232 U. S. 168, 169, 58 L. Ed. 555, 557, 558 (1914) 4, 5, 7

American Radio Ass'n. v. Mobile Steamship Ass'n., 419 U. S. 215, 231, 42 L. Ed. 2d 339, 411 (1974) 9

Cardinale v. State of Louisiana, 394 U. S. 437, 438, 22 L. Ed. 2d 398, 400 (1969) 8

Cooper v. Roberts, 59 U. S. (How.) 173, 181, 15 L. Ed. 338, 341 (1856) 4, 5, 7

County of Cook v. Calumet and Chicago Canal and Dock Co., 138 U. S. 635, 34 L. Ed. 1110, 1117 (1890) 6, 9

Durley v. Mayo, 351 U. S. 277, 285, 100 L. Ed. 1178, 1185 (1956) 9

Fuller v. Oregon, 417 U. S. 40, 50, n. 11, 40 L. Ed. 2d 642, 653 (1974) 8

Monaco v. Board of Education, 77-1797 (CA 7, May 12, 1977; unpubl. order) cert. den. Supreme Court of United States, 77-5569, November 28, 1977 4

Stewbridge v. Georgia, 343 U. S. 541, 547-548, 96 L. Ed. 1130, 1133-1134 (1952) 9

Statutes.

28 U. S. C. 1257(2) 10

IN THE

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OCTOBER TERM, 1977.

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RICHARD LAWRENCE AND NICHOLAS BARNES,
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Appellees.

ON APPEAL FROM THE APELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MOTION OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO TO DISMISS OR AFFIRM.

Pursuant to Rule 16 this motion to dismiss or affirm is filed on behalf of the Board of Education of the City of Chicago, appellee.

The appeal presents no substantial federal question. The exercise of control over school land in Illinois, which the Illinois Trial, Appellate and Supreme Courts have here sustained, is well within the "plenary and exclusive" powers of the state which this court has previously upheld in cases coming from other states. Appellants' attacks on the Board of Education's determination of the leasehold rental for the subject property during the years 1970-1974 not only are frivolous but are based on gross distortion of the facts. Equally frivolous

is appellants' claim of conflict with the Ordinance of 1787 and the Illinois Enabling Act—a claim which, moreover, was neither properly raised nor expressly passed on by the courts of Illinois. In addition, the judgment of the Appellate Court rests on adequate state grounds and there is no state statute alleged to be in conflict with a federal constitutional or statutory provision. Accordingly, plenary consideration of the case by this court is not warranted.

STATEMENT.

This is an appeal from the decision of the Appellate Court of Illinois (appellants' petition for leave to appeal was denied by the Supreme Court of Illinois), affirming judgment for appellees entered by the Circuit Court of Cook County which found that appellants had failed to sustain their burden of proof.

The Board of Education has leased the subject property to the City of Chicago for municipal airport purposes since 1931. The lease expires in 1980. Data which was supplied to the Board disclosed that rents received from the City had been rising sharply under the existing rental formula (J. S., A6, 10), and the Board of Education approved continuing the same, promising basis of determining rent for the period 1970-1974. The Board had studied, discussed and carefully considered all available facts (J. S., A9, 13-14). It reached a business decision of a discretionary nature after considering the rise in rents occurring simultaneously with the City's efforts to revitalize the airport. The Board had the guidance and counsel of one of the most respected and knowledgeable real estate men in the Chicago area who recommended continuing the existing rental formula (J. S., A11). It acted in good faith with a view to maximizing long range benefits to the public schools and with knowledge of a mutually beneficial pattern of cooperation which exists with the City (J. S., A13-14). Accordingly, the Board adopted report 70-766-2 on August 26, 1970 (J. S., A1), approving the supplemental lease agreement with the City of Chicago. The existing provision in the lease for determining rents, which was based on ten percent of the City's gross revenue plus a fixed sum per year, was thus continued during the years 1970-1974.

The Board received a study of its real estate holdings in March, 1972 from Real Estate Research Corporation which had been employed for that purpose by the Board. That firm concluded that rental income under the existing formula, which the Board had carefully considered and approved, would continue to increase because the City's gross revenue from the airport was expected to increase (J. S., A10).

At the trial plaintiffs failed to introduce any evidence of fair cash market value of the subject property or evidence that it could be more profitably put to some other use. The trial court ruled that plaintiffs failed to sustain their burden of proof and entered judgment for appellees. The Appellate Court of Illinois affirmed the trial court judgment and held that the supplemental agreement continuing the existing rental formula was, under the facts in the record, a proper exercise of the Board's discretionary power pursuant to Illinois law.

On appeal to the Illinois Appellate Court and Supreme Court no federal statutory or constitutional issues were presented by appellants. (The issues presented to the Illinois Appellate Court by appellants herein are set out in Appendix.)

In their petition for leave to appeal to the Supreme Court of Illinois, appellant's brief contained no statement of issues. However, their brief contained the "Points for Reversal" set out in Appendix.

The opinions and orders of the state Courts do not mention, discuss or pass upon any federal question whatsoever (J. S., A4-15). Appellants filed no petition for rehearing in any Illinois court.

ARGUMENT.

I.

The Case Presents No Substantial Federal Question Warranting Review by This Court.

It is settled that the state, consistent with the Federal Constitution and law has "plenary and exclusive" power over school land granted by the early enabling acts of Congress such as that of Illinois. *Alabama* v. *Schmidt,* 232 U. S. 168, 169, 58 L. Ed. 555, 557, 558 (1914); *Cooper* v. *Roberts,* 59 U. S. (18 How.) 173, 181, 15 L. Ed. 338, 341 (1856); *Monaco* v. *Board of Education,* 77-1797 (CA 7, May 12, 1977; unpubl. order) cert. den., Supreme Court of the United States 77-5569, November 28, 1977. The opinion of the Court of Appeals is set out in Appendix hereto (A3-6). In *Alabama* v. *Schmidt,* this Court, held that legal title to section 16 school land had vested in the state "for a public purpose of which *that state is the sole guardian* and minister." (58 L. Ed. 558) Section 16 lands were granted to Alabama (3 U. S. Stat. at Large 489, 491, March 2, 1819) only 1 year after the Illinois Enabling Act. (3 U. S. Stat. at L. 428, ch. 67, April 18, 1818). The state sued to recover possession of section 16 land which defendant claimed by right of adverse possession under state statute. It was stipulated that the land still belonged to the state if defendant had not gotten title by adverse possession, which it was agreed defendant had, if the state statute, limiting suits like the one involved to twenty years, was valid as applied to section 16 school land. The trial court upheld defendant's title by adverse possession as authorized by the state statute. Judgment for defendant was affirmed by the Supreme Court of Alabama.

This Court affirmed and in an opinion written by Mr. Justice Holmes declared at pp. 557-558 (L. Ed.):

> "The above-mentioned act of Congress, under which Alabama became a state, provided that section 16 in every township 'shall be granted to the inhabitants of such township for the use of schools.'
>
> * * * * *
>
> "The argument for the plaintiff in error relies mainly upon *Northern P. R. Co.* v. *Townsend,* 190 U.S. 267, 47 L Ed. 1044, 23 Sup. Ct. Rep. 671, which held that a right of way over public land granted by the United States for railway purposes could not be extinguished by adverse possession under the statute of limitations of the state in which the land lay. The ground of that decision was that the grant to the railroad was not a coveyance of the land in fee simple absolute, but a limited grant 'on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.' . . . (citing cases) *But it does not apply to a gift to a state for a public purpose of which that state is the sole guardian and minister.* As long ago as 1856 it was decided 'the trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which *the power of the state is plenary and exclusive;*' and it was held that the state of Michigan could sell its school lands without the consent of Congress. *Cooper* v. *Roberts,* 18 How. 173, 15 L Ed. 338. This decision adverted to the fact that it had been usual for Congress to authorize the sale of lands if the state should desire it, but suggested that it was unnecessary (which indeed, followed from what was decided) and thus met the further argument here pressed that a qualified permission to sell was given to Alabama by a much later act of March 2, 1927, chap. 59, 4 Stat. at L. 237. It also disposes of other forms of the same contention, that the state law impairs the obligation of its contract, or involves a *breach of trust,* supposing that such positions are open to the state to take. *American Emigrant Co.* v. *Adams County,* 100 U.S. 61, 25 L. Ed. 563." (Emphasis added.)

The *Cooper* and *Alabama* cases hold that full legal title to section 16 land vested in the states upon the grants by early enabling Acts of Congress; that the states had "plenary and exclusive" power over school land trusts created by the early enabling acts; that the state was the sole guardian and minister

of the public purpose; and that federal law was not violated by state adverse possession statutes permitting total loss of section 16 school land granted to the state by the early acts.

The grant of school land by the Illinois Enabling Act on April 18, 1818, is practically identical to the grants to Michigan in 1836 and Alabama in 1819 involved in the *Cooper* and *Alabama* cases. The holdings of this Court in the above decisions that the power of the state over school land is "plenary and exclusive" applies equally to Illinois. The Illinois, Alabama and Michigan Enabling Acts were passed at about the same time. For this reason and because of the similarity of language in the three Federal Acts, Illinois has "plenary and exclusive power" over the subject property and no substantial federal question is presented in this case. In *County of Cook* v. *Calumet and Chicago Canal and Dock Co.*, 138 U. S. 635, 34 L. Ed. 1110, 1117 (1890) this Court said at p. 1117 (L. Ed.):

> "We have repeatedly held that the State had full power of disposition of the lands, and that the application of the proceeds to the purposes of the grant rested upon the good faith of the State, which might exercise its discretion as to their disposal." (Citing cases.)

The cases that appellants cite (J. S. 12), *Lassen* v. *Arizona*, 385 U. S. 458 (1967) and *Alamo Land and Cattle Co.* v. *Arizona*, 424 U. S. 295 (1976) are not in point. The facts involved and the Arizona-New Mexico Enabling Act construed in those cases both are patently different than the facts in the instant case and the school grant provision in the Illinois Enabling Act of April 18, 1818. *Lassen* involved the acquisition of interests in school land by the state admittedly without payment of any compensation whatsoever for the property taken. Unlike *Lassen*, there is no taking of any property without compensation in the instant case. On the contrary, the Board of Education owns the land, has not parted with it or any interest in it, and is assured under its lease, for which substantial rent is received, that at the expiration of the lease term just two years

away it will also own the improvements constructed on the land at lessee's expense. The Arizona-New Mexico Enabling Act, totally unlike that of Illinois, contained constraints on the leasing and disposal of school lands in those states. Explicit federal statutory restrictions in the nature of conditions were imposed on the power of Arizona and New Mexico over school land leasing and disposal. It was this Court's ". . . concern for the integrity of the conditions imposed by the Act, . . ." which compelled the holding in *Lassen* that the state violated the express provisions of the Arizona Enabling Act. See *Alamo Land and Cattle Co.* v. *Arizona*, 424 U. S. 295 at 302-303 (1976) for analysis of *Lassen*. As stated, no such statutory conditions were imposed in the Illinois Enabling Act. In the absence of restrictions in the Enabling Acts passed by Congress a century earlier such as those of Illinois, Michigan and Alabama, this Court has followed the settled rule that "plenary and exclusive power" over the school land trusts is in the state. See *Cooper* v. *Roberts*, 59 U. S. (18 How.) 173, 181 (1856), *Alabama* v. *Schmidt*, 232 U. S. 168, 169 (1914). There is no similarity between the 1818 Illinois Enabling Act grant of section 16 to the state and the grants to Arizona-New Mexico a century later. Appellants concede as much (J. S. 13). Moreover, there is no loss to the public schools in the instant case as there was in *Lassen* where school land interests were acquired without payment by the state of compensation for the property taken. On the contrary, the Board of Education acted to maximize benefits to the Chicago public schools (J. S. A. 13-14). Accordingly, no substantial federal question is presented in this case and plenary consideration of the appeal is not warranted.

II.

The Question Which Appellant Seeks to Have Reviewed Was Not Properly Raised or Expressly Passed on by the State Courts.

No federal constitutional or statutory issue was presented for review to the Appellate Court of Illinois and as a result no federal issue was mentioned, discussed or passed upon by the Appellate Court of Illinois. See opinion of the Appellate Court (J. S. A4, *et seq.*). The issues presented to the Illinois Appellate Court by appellants herein are set out in Appendix hereto.

No federal question was presented for review to the Supreme Court of Illinois in the appellants' petition for leave to appeal. Appellants' "points for reversal" in their brief in the Illinois Supreme Court—no issues were stated—are set out in Appendix hereto. Appellants filed no petition for rehearing in any Illinois Court.

The Appellate Court of Illinois in its decision did not mention, discuss or consider any federal question. Nor was a decision thereon necessary to a determination of the cause. The point was, that after extensive discovery and an exhaustive trial in the case, appellants were found to have failed to sustain their burden of proof. The decision of the trial court was primarily factual. The decision of the Appellate Court of Illinois affirming the judgment of the trial court in favor of appellees was based primarily on local law. Questions of fact and state law are not open to re-examination in this court. On the record, it is beyond doubt that the question sought to be reviewed is not before this Court. The statutory provision in 28 USC 1257(2) providing for review of a state court judgment denies jurisdiction to review federal issues raised for the first time in Supreme Court. *Cardinale* v. *State of Louisiana,* 394 U. S. 437, 438, 22 L. Ed. 2d 398, 400 (1969); *Fuller* v. *Oregon,* 417 U. S. 40, 50, n. 11, 40 L. Ed. 2d 642, 653 (1974).

In the case at bar Illinois' courts determined the questions raised, as was done by the state courts in *Cardinale* and *Fuller,* without consideration of any federal issue. Under the above decisions of this Court, we submit there is no jurisdiction of the appeal.

III.

The Opinion of the Illinois Appellate Court Shows That Its Judgment Rests on Adequate State Grounds.

Based on facts in the record, the Appellate Court correctly found the evidence established that the Board of Education considered all available information, and carefully deliberated with a view toward maximizing benefits to the Public Schools of Chicago from the lease of the subject property (J. S., A9, 14). The trial court was presented with essentially a factual dispute which it resolved in favor of defendants (J. S. A13). The Board of Education's leasing powers are derived from Illinois statutory authority (J. S., A14). The Appellate Court held, based on state law, that it was unable to substitute its judgment for the discretionary powers of the Board of Education over the leasing of school land where the record showed the Board was not arbitrary, acted in good faith and the trial court's judgment was not contrary to the manifest weight of the evidence. Under this Court's decisions, discretion as to disposal of school land is within the power of the state. *County of Cook* v. *Calumet and Chicago Canal and Dock Co.,* 138 U. S. 635, 34 L. Ed. 1110, 1117 (1890). Under circumstances such as exist in the instant case, where the state judgment rests on independent state grounds, this Court has consistently held there is no jurisdiction on appeal. *Durley* v. *Mayo,* 351 U. S. 277, 285, 100 L. Ed. 1178, 1185 (1956); *Stewbridge* v. *Georgia,* 343 U. S. 541, 547-548, 96 L. Ed. 1130, 1133-1134 (1952). Further, this Court has held that the sufficiency of evidence to support a state claim that has been tried in the state courts is a matter for decision in those courts. *American Radio Ass'n.* v. *Mobile Steamship Ass'n.,* 419 U. S. 215, 231, 42 L. Ed. 2d 399, 411 (1974).

IV.

There Is No State Statute, Ordinance or Regulation, Legislative in Character, Alleged to Be in Conflict with Federal Law.

The Board of Education report of August 26, 1970, of which appellants complain, was not at all legislative in character. Such Board action continued in force, during the years 1970-1974, an existing basis for determining rent to be paid by the City under the lease of the subject property. A school district's agreement as to the rental provision in a lease is not, we submit, a "statute" within the meaning of 28 USC 1257(2) and the Court lacks jurisdiction of the appeal under the statute.

CONCLUSION.

Based on the above authorities and for the foregoing reasons, the Board of Education of the City of Chicago respectfully moves the Court to dismiss the appeal taken herein or to affirm the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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RICHARD E. GIRARD,
Of Counsel.

APPENDIX.

The following issues were presented for review by appellants before the Illinois Appellate Court (P. 2 of appellant's brief before the Appellate Court of Illinois):

"ISSUES PRESENTED FOR REVIEW.

"A. The issue is whether the plaintiffs proved that the defendant Board of Education failed to discharge its duty as trustee to exercise judgment and care in the administration of the Midway Airport property.

"B. The issue is whether the plaintiffs proved that defendant Board of Education failed to discharge its duty as trustee to act with undivided loyalty with respect to the Midway Airport property.

"C. The issue is whether the plaintiffs proved that the defendant Board of Education failed to receive a fair rental for the Midway Airport property.

"D. The issue is whether the trial court erred in admitting certain evidence offered by the defendants respecting valuation of the Midway Airport property."

The following "points for reversal" were presented for review by Appellants before the Illinois Supreme Court (P. 2 of appellants' petition for leave to appeal to the Supreme Court of Illinois):

"POINTS FOR REVERSAL

"A. The Appelate Court Erred In Affirming The Trial Court's Holding That Plaintiffs Failed to Meet Their Burden Of Proof On The Issue Of Breach Of The Trust Duty Of Care.

"B. The Appellate Court Erred In Affirming The Trial Court's Holding That Plaintiffs Failed To Meet Their Burden Of Proof On The Issue Of Breach Of The Trust Duty Of Loyalty.

"C. The Appellate Court Erred In Affirming The Trial Court's Holding That Plaintiffs Failed To Meet Their Burden Of Proof On the Issue Of Breach Of The Trust Duty To Receive A Fair Rental For Trust Property.

"D. The Appellate Court Erred In Its Determination Of Plaintiffs' Burden Of Proof And In Concluding That The Trial Court Had Properly Resolved A Factual Dispute As To The Value Of The Midway Land In Favor Of The Defendants.

"E. The Appellate Court Improperly Considered Evidence Of Additional 'Benefits' Conferred By The City Upon The Board And Failed To Meet Plaintiffs' Contention That Such 'Benefits' Could Not Have Been Considered By The Trial Court".

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued February 18, 1977)
May 12, 1977

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

SHIRLEY MONACO, MARY CVACK, FRANCINE MACCHITELLI, *Plaintiffs-Appellants,*

No. 76-1797 *vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a Body Politic and Corporate, and JAMES F. REDMOND, General Superintendent of Schools of the Board of Education of the City of Chicago, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75 C 3115

William J. Lynch, Judge.

ORDER

In this taxpayers' action, plaintiffs challenge the defendant school board's expenditure of proceeds from the sale of common school lands for the renovation of school buildings, primarily on the ground that, under state and federal laws, the board is obliged to treat those proceeds as the corpus of a trust held for

the benefit of the schools. The District Court granted defendants' motion for summary judgment. On appeal, plaintiffs' numerous objections to the court's order fall into three general categories: challenges to the summary judgment procedure, arguments that the court misinterpreted the applicable federal statutes, and arguments that the board's action was also taken in violation of state law. We affirm.

First, plaintiffs misinterpret the purpose of a summary judgment motion. In this case the facts relevant to a determination of the federal question were undisputed: the school board admitted that it had sold the land in question without a referendum and that it used the proceeds therefrom for school renovation purposes. Thus the only issue that remained was whether the board's actions were contrary to the federal statutes granting the land to the state of Illinois. Such a purely legal issue is clearly a proper subject for adjudication on a summary judgment motion.

Second, the District Court's disposition of the federal question was correct. Plaintiffs' argument appears to be as follows: On its admission to the Union in 1818, Illinois was granted certain lands in each township "for the use of the inhabitants of such township for the use of schools." 3 Stat. 428. Illinois was thus made a trustee of the land for the benefit of its people with the direction to use the trust for school purposes. In 1843 Congress clarified the state's power as trustee by authorizing

> ". . . the sale and conveyance in fee simple, of all or any part of the lands heretofore reserved and appropriated by Congress for the use of the schools . . . and to invest the money arising from the sale thereof in some productive fund, the proceeds of which shall be forever applied, under the direction of [the Illinois] Legislature[ ], to the use and support of schools . . . and for no other use or purpose whatever: Provided, Said land, or any part thereof, shall in no wise be sold without the consent of the inhabitants of such township . . . to be obtained in such manner as the Legislature[ ] . . . shall by law direct."

5 Stat. 600. This statute also provided that the state could lease the land for a term not exceeding four years if that was the more productive course and could invest whatever income was derived from the land if that income in itself was insufficient to support the schools. Plaintiffs argue that the statute of 1843 marks the outer limits of the state's power with respect to common school land and that the board clearly exceeded those limits by selling land without a referendum and by spending, rather than investing, the proceeds from the sales.

Plaintiffs' interpretation of the statutes would be plausible were it not for two Supreme Court decisions, *Cooper* v. *Roberts*, 59 U. S. (18 How.) 173 (1856) and *Alabama* v. *Schmidt*, 232 U. S. 168 (1914), which hold that statutes similar to the 1818 grant gave the state "plenary and exclusive" power over the donated lands. As the District Court noted, it is hornbook property law that an absolute grant of property cannot be made conditional by action taken long after the gift has been completed. Accord, *Louisiana* v. *William T. Joyce Co.*, 261 F. 2d 128 (5th Cir. 1919).* Inasmuch as defendant obeyed the original 1818 command to use the land for school purposes, the District Court was correct in granting defendant's motion for summary judgment.

Finally, federal jurisdiction over plaintiffs' claims based on Illinois law depended on the court's jurisdiction over the federal question. When that question was resolved adversely to plaintiffs, before trial, it was proper for the District Court to dismiss

* Plaintiffs' assertion that this court "struck down" the precedents cited above in a prior appeal is based on their misunderstanding of a statement made at oral argument to the effect that these cases were not "conclusive" of the legal issues raised in plaintiffs' complaint. The two Supreme Court cases involved other statutes which, while similar, were not identical to the Illinois grant. The Fifth Circuit opinion did involve the same 1848 statute (as applied to Louisiana) but was of course not binding on us. On remand, however, these cases remained highly relevant and persuasive, especially in light of plaintiffs' failure to cite any legislative history or case law distinguishing the Illinois grant or impairing the Fifth Circuit's property-based analysis.

the entire action, leaving plaintiffs free to pursue their state law claims in the state courts. Wright, *Federal Courts* 74-75 (3d ed. 1976).

Accordingly, the District Court's order is AFFIRMED.

Supreme Court, U. S.
FILED
FEB 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-934

RICHARD LAWRENCE AND NICHOLAS BARNES,
Appellants,

VS.

BOARD OF EDUCATION OF THE CITY OF CHICAGO AND THE CITY OF CHICAGO,
Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

Appellants Richard Lawrence and Nicholas Barnes respectfully submit this brief opposing the motions to dismiss or affirm filed herein by the Board of Education of the City of Chicago [hereinafter "Board"] and the City of Chicago [hereinafter "City"].

THE FEDERAL QUESTIONS PRESENTED IN THIS APPEAL WERE RAISED BELOW

In its motion to dismiss or affirm, the Board contends that: "no federal constitutional or statutory issue was presented for review to the Appellate Court of Illinois and as a result no federal issue was mentioned, discussed or passed upon by the

Appellate Court of Illinois", and that "no federal question was presented for review to the Supreme Court of Illinois in the appellants' petition for leave to appeal". (Board Motion, 8.)

The issue whether a federal question has properly been raised and preserved, while "itself ultimately a federal question. . .", is determined by reference to the practice of the state from whose courts the appeal is taken. *Street* v. *New York*, 394 U. S. 576, 583-84 (1969). Under Illinois Supreme Court Rule 341 (58 Ill. 2d Rule 341):

> ". . . it is not now required that the Points and Authorities consist of the propositions relied upon in support of the appeal, nor does this rule limit the Argument to points made in the Points and Authorities . . . . Thus, under the present rule it is the *content* of the Argument in the appellant's brief which determines the propositions relied upon in support of the appeal". *Collins* v. *Westlake Community Hospital*, 57 Ill. 2d 388, 391-92; 312 N. E. 2d 614, 616 (1974) (emphasis added).

The Board does not contend that the federal questions presented to this Court were not argued in the Illinois Appellate and Supreme Courts, or that they are not supported by the Record on Appeal, and in fact the arguments were extensively presented to those courts. (Jurisdictional Statement, 10-11.) Appellants have fully preserved the federal questions at all stages of the litigation under Illinois law.

While Illinois Supreme Court Rule 341 is thus dispositive of the preservation question raised by the Board, it should also be noted that the "Points and Authorities," "Issues Presented For Review" and "Points For Reversal" sections of appellants' briefs and petitions in the state appellate courts asserted the existence and violation of a fiduciary duty toward the Midway land. From the outset of the litigation, appellants have asserted that the trust duty arises out of federal law. (Jurisdictional Statement, 7.) The Board has consistently admitted that it holds the Midway Airport Property in trust for the use of schools. (Answer to [Second] Amended Complaint, ¶ 12.)

Finally, the Board's contention that no federal issue was mentioned, discussed or passed upon by the Appellate Court of Illinois is simply untrue. The Appellate Court clearly acknowledged that appellants' argument that the Board had breached its trust duty of undivided loyalty was founded upon this Court's decision in *Lassen* v. *Arizona ex rel. Arizona Highway Department*, 385 U. S. 458 (1967) and upon the decision in *United States* v. *78.61 Acres of Land*, 265 F. Supp. 564 (D. Neb. 1967) (Jurisdictional Statement, A7), and thus recognized the federal law underpinnings of appellants' breach of trust arguments. The Appellate Court's failure to decide the questions raised when it should have done so does not impair appellants' standing in this Court.

THE ISSUES PRESENTED IN THIS APPEAL ARE QUESTIONS OF FEDERAL LAW AND NOT OF FACT

In attempting to bolster their arguments that this case does not present a substantial federal question, the Board and the City make several serious misstatements of fact that appellants cannot leave uncorrected. Both suggest that there was no loss in rentals to the Board as a consequence of its conduct; this is directly refuted by the opinion of the court below, which held that such diminution of rentals was "clear". (Jurisdictional Statement, A8-9.) The Board now claims that it "studied, discussed and carefully considered all available facts". (Board Motion, 2.) Some of the numerous facts disregarded by the Board are more fully set forth in the Jurisdictional Statement at pp. 8-10. If the Board is now professing possession of and reliance on these facts, its breach of trust is all the more clear.

The appellees' conduct is well evidenced in the record below; at issue here is the legal standard by which their acts must be measured. The court below held these acts not to be arbitrary or corrupt. Appellants contend that neither that standard nor the concept of "plenary and exclusive" state sovereignty over

school land which the Board now urges for the first time in this long litigation (Board Motion, 4), govern the acts of a public fiduciary of federal grant lands.

For the foregoing reasons, appellants respectfully urge that appellees' motions to dismiss or affirm be denied, and submit that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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